Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

No. 95-912

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD HIATT, *et al.*,
Petitioners,
v.
UNION PACIFIC RAILROAD COMPANY, a Utah Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

JEROME SMITH, *et al.*,
Petitioners,
v.
BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT UNITED TRANSPORTATION UNION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(1) Whether the Court of Appeals properly held that the Plaintiff's claims lacked a basis in law because of the operation of a *bona fide* seniority system.

PARTIES TO THE PROCEEDINGS BELOW

A. *Hiatt v. Union Pacific*, Case No. 94-8088

Leonard K. Hiatt; Robert A. Bagby; Marvin Crabaugh; Gary W. Boatright; Ronald L. Roberson; Carl D. Houk; Jerrold B. Hutchins; Duane K. Hinkle; Larry L. Burbank; Stephen J. Miller; Kim R. Hardman; Kenneth B. Covington; Michael E. Valentine; Gary L. Yanken; Patrick M. Herrley; Mike I. Carlson; Randall O. Swarthout; Sammy L. Cross; Darrel D. Miller; Ronald L. Stoddard; James D. Tolle; Larru S. Clark; Robert T. Epler; Richard W. Cavender; Dale Young; Robert F. McIntosh; Julian R. Nelson; Walter T. Gronek; Ronald E. Ostendorf; Ronald R. Johnson; Melvin E. Sayre; Robert F. Lannon; Gerald T. Dueling; Philip J. Eberhardt; Roxie L. Jackson; Russell P. Eggers; Ron G. Van Northwick; Thomas M. McMurtry; Larry R. Mann; Maurice F. McDonald; Donald A. Raschke; Cleo D. Schroeder; Kenneth W. McIntosh; Robert A. Podjenski; Gilbert R. Throm; Donald K. Peters; Robert G. Wenzel; Cecil B. Miller; Leroy W. Roth; James L. Wells; Charles F. Smartt; James W. Jenkins; John J. Stamate; Gerry W. Spinden; David E. Dupree; Donald R. Smith; ames P. Manary; Ronald B. Hunt; Robert E. Williams; Dennis J. Smith; Gary E. Metcalf; Benny L. Covington; Robert E. Wedgwood; Norman R. Thomas; Jon L. Stone; Steven L. Brown; John R. Holloway; Warren H. Bush; Edward W. Berardino, Plaintiffs-Appellants; and,

Union Pacific Railroad Company, Defendant-Appellee; and,

United Transportation Union, Defendant-Appellee.

B. Smith v. Burlington Northern Railroad, Case No. 94-8089

Jerome J. Smith; Michael R. Ramold; Michael X. Kosmicki; Richard J. McCune; Daniel L. Eastman; Donald E. Looker; Robert A. Harger; Steven L. Burbach; Donald S. Seghi; Roland G. Beard; Earl J. Vance; Bruce O. Staf-

ford; Richard K. Loehning, Jr.; Tracy B. Miller; Gary L. Jones; Robert M. Hagy; William A. Myers; Gene F. Noonan; Kenneth J. Puchalski; Robert L. Keenan; Robert F. Garland; David A. Growe; Michael P. O'Neil; Timothy J. Hoppe; Albert G. Kelsch; Steven F. Massey; John M. Crawford; Tarrell L. Newman; Bill G. Hamilton; Verl W. Moore; Charles W. Rohe; Albert W. Greenwood; Gerald A. Gompert; Gary L. Katiepolt; Dick C. Jones; Jon Lutz; Charles D. Barnhill; Larry G. Wright; Thomas W. Schaefer; John C. Rosenstock; Steven E. Bishop; Roger G. Mazanec; Edward Jay Deitz; Steve V. Brew; Lavern L. Brown; Donald Masek; Donald Rosekrans; Robert H. Hall; Jack A. Reighard; Roger E. Rohrbouck; James Moritz; Harold Jones, Plaintiffs-Appellants; and,

Burlington Northern Railroad Company, Defendant-Appellee; and,

United Transportation Union, Defendant-Appellee.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
STATUTES INVOLVED	2
COUNTER STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Statement of Facts	3
SUMMARY OF ARGUMENT	8
REASONS FOR DENYING THE WRIT	8
I. PETITIONERS/PLAINTIFFS FAIL TO ESTABLISH A BASIS FOR REVIEW OF THE APPELLATE COURT'S DECISION	8
II. PLAINTIFFS FAIL TO ESTABLISH THAT THE COURT SHOULD REVIEW ANY RULING OF THE DISTRICT COURT	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 9

Baraw v. New Orleans Steamship Ass'n, 932 F.2d 473 (5th Cir. 1991) 10

Brotherhood of R.R. Trainmen v. Akron & Barberton Belt, 385 F.2d 581 (D.C. Cir. 1967) 3

Dalton v. Mercer Co. Bd. of Educ., 887 F.2d 490 (4th Cir. 1989) 9

Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419 (10th Cir. 1993) 11, 12

Fay v. Noia, 372 U.S. 391 (1963) 8

Firefighters for Racial Equality v. Bach, 731 F.2d 664 (10th Cir. 1984) 9, 10

General Talk. Pictures Corp. v. Western Electric Corp., 304 U.S. 175 (1937) 11

J. Truett Payne Co. v. Chrysler Motors Corp., 951 U.S. 557 (1981) 12

Hamilton v. First Service Bank, 928 F.2d 86 (4th Cir. 1990) 10

Harvey v. United Transportation Union, 878 F.2d 1235 (10th Cir. 1989) 9

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 9, 10

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 8, 10, 11

Patrick v. Burget, 486 U.S. 94 (1983) 12

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 9

United Transportation Union v. United States, 987 F.2d 784 (D.C. Cir. 1993) 7

Statutes:

28 U.S.C. § 2101(e) 12

29 U.S.C. § 621 et seq. 2

29 U.S.C. § 623(f)(2) 9

29 U.S.C. § 623(f)(2)(A) 9

45 U.S.C. §§ 154-156 5

45 U.S.C. § 160 5

Public Law 100-352 § 1, 102 Stat. 662 (1988) 11

Public Law No. 102-29, 105 Stat. 165 (1991) 2, 3, 6, 7

Staggers Rail Act, Pub. L. No. 96-448 3

TABLE OF AUTHORITIES—Continued

Rules Cited: Page

Supreme Court Rule 10 ..... 8, 10, 11, 12
Supreme Court Rule 11 12

Treatise:

Wright & Miller, Fed. Prac. & Proc. (1988) 8, 11, 12

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RESPONDENT UNITED TRANSPORTATION UNION'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, United Transportation Union, respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW

In Case Nos. 94-8088 and 94-8089 (10th Cir. Sept. 8, 1995), the Court of Appeals affirmed the district court's grant of summary judgment based on the fact that Respondents were acting in accordance with an admittedly *bona fide* seniority system.

The district court's opinion, which is reported at 859 F.Supp. 1416 (D. Wyo. 1994), granted Respondents' motions for summary judgment.

STATUTES INVOLVED

The decision of the Court of Appeals is based on the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Public Law No. 102-29, 105 Stat. 169 (1991) also plays an important part in this case.

COUNTER STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs, all unpromoted brakemen, employed by either the Union Pacific Railroad (UPRR) or the Burlington Northern Railroad Company (BNRR) initially filed charges with either the Nebraska Equal Opportunity Commission or the Equal Employment Opportunity Commission. The UPRR employees' charges were handled by the Nebraska Commission and the BNRR employees' charges were handled by the EEOC's regional office in Dallas, Texas. The charges were identical claiming a violation of the ADEA due to the mandatory promotion provision of Presidential Emergency Board No. 219, codified in Pub. L. No. 102-29. After investigations, in separate decisions, both Commissions issued no probable cause findings and right-to-sue letters in April 1993. (Apx. C & D).

Plaintiffs then filed an action in the U.S. District Court for the District of Wyoming alleging a violation of the ADEA. The Respondents filed motions for summary judgment and on August 3, 1994, the district court granted the motions. (Apx. B).

Plaintiffs appealed to the U.S. Court of Appeals for the Tenth Circuit. On September 8, 1995, the Court of Appeals finding that Plaintiffs' claims lacked a sufficient basis in law as Respondents were acting in accordance with an admittedly *bona fide* seniority system, upheld the dismissal of Plaintiffs' claims.

B. Statement of Facts [1]

This case revolves around the interpretation and effect of an Act of Congress which was signed into law on April 18, 1991, by then-President George Bush. *See* Pub. L. No. 102-29 (Apx. 543a). All of the Plaintiffs had been employed by the Defendant railroads as brakemen until they were forced to accept mandatory promotion to conductor. (Apx. 14a).

By way of background, in 1980, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, which essentially deregulated the rail industry. Since that time, the nation's major rail carriers, including Defendants UPRR and BNRR, have attempted to reduce the size of their train crews. (Apx. 17a). Historically, the number of men necessary to form a crew was determined by what are known as crew consist agremeents. A traditional train crew consisted of an engineer, a conductor, a fireman and either two or three brakemen. (*Id.*). Due to technological advances, however, including the advent of the diesel locomotive, the positions of fireman and third brakeman have been obsolete and have been virtually eliminated. *See Brotherhood of R.R. Trainmen v. Akron & Barberton Belt*, 385 F.2d 581, 588-92 (D.C. Cir. 1967); also Apx. 550a.

The carriers, however, have recently demonstrated an increased resistance to the brakeman's position because of their belief that its function is obsolete. (Apx. 18a). As a result, the carriers have attempted to eliminate as many of those positions as possible for obvious economic

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[1] This Statement of Facts is essentially taken from the findings of the District Court.

reasons. (*Id.*). Unfortunately for the carriers, reduction by attrition was too slow and the moratoria provisions in the crew consist agreements prevented the carriers from attempting to reopen negotiations on the issue.[2] As a result, the carriers have retained what they perceive to be the excess brakeman's positions. (Apx. 18a).

In July of 1988, pursuant to the terms of the Railway Labor Act, UTU's General Committees served Section 6 notices on the carriers in an effort to modify particular portions of the then-existing collective-bargaining agreements.[3] Specifically, the unions sought to improve the wages and health care benefits of their members. (*Id.*). The service of the Section 6 notices opened the negotiations but only with respect to the matters designated therein. (*Id.*).

In October of 1988, the carriers filed their own Section 6 notices which contained a counter-proposal seeking dramatic wage cuts for its employees. (*Id.*). Sensing an opportunity to renegotiate the important crew consist issue, the carriers offered an alternative proposal: a smaller wage cut than the one initially proposed in exchange for the unions' agreement to reopen negotiations on the crew consist matter. (*Id.*). The carriers' intent to reduce the number of brakemen by reopening the negotiations on that issue was plainly apparent from their Section 6 notices, which stated that they wanted to require any train service employee to accept a promotion to conductor and/or engine service or forfeit their seniority and terminate the employment relationship. (Apx. 18a-19a).

This so-called "mandatory promotion" requirement forms the basis for the complaints filed in this case. The

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[2] UTU and various carriers, including Defendants, were parties to a 1980 crew consist agreement which provided that further crew reductions would be by attrition and that a moratorium would be in place barring reopening this issue for a specified period of time. (Apx. 17a-18a, 550a-551a).

[3] "Section 6 notice" is an industry term referring to the serving of a formal notice opening certain collective bargaining items for negotiation.

carriers sought to reduce the number of brakemen while at the same time increasing the number of conductors, a position that was undermanned, by promoting the extra brakemen to conductor status. The union, however, refused to consent to renegotiate the crew consist agreements, relying on the moratoria provisions (Apx. 19a; 550a-551a).

As negotiations moved to the national level, it became readily apparent that the negotiations at this level were not going to produce any results, and the parties thereafter sought the assistance of the National Mediation Board (NMB).[4] (Apx. 19a). The NMB's year-long effort to mediate this dispute also failed to resolve this stalemate. The parties subsequently refused to submit their dispute to arbitration. As that point, the NMB certified to President Bush that this dispute could in fact threaten interstate commerce. (*Id.*).

On May 3, 1990, President Bush, acting pursuant to 45 U.S.C. § 160, and in accordance with the recommendations of the NMB, appointed Presidential Emergency Board No. 219 ("PEB" or "the Board") to investigate the dispute between the carriers and the unions and to issue a recommendation. (Apx. 19a-20a).

The Board conducted extensive hearings and heard testimony from numerous interested parties. Both the UTU and the carriers argued the mandatory promotion issue before the Board. (Apx. 20a). The UTU *vehemently opposed* this proposal while the carriers argued that it was necessary because there were too many brakemen positions that were no longer needed and which they were being forced to fund, while they were simultaneously suffering from a shortage of conductors. (*Id.*). Thus, the carriers, claimed that the requirement that brakemen accept a promotion to conductor status would be more efficient and would eliminate the excess brakemen. (*Id.*).

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[4] The NMB is the federal agency designated to assist the parties in resolving "major" disputes. 45 U.S.C. §§ 154-156.

On January 15, 1991, the Board issued its report and recommendations to President Bush. The Board recommended that the carriers' proposal for a wage cut be rejected, and furthermore, that a series of wage increases be given. (*Id.*). In return for the wage increases, however, the Board recommended that the moratoria provisions of the earlier crew consist agreements be lifted, that the parties be permitted to serve Section 6 notices locally on the crew consist issue and that a new round of negotiations on this issue take place. (*Id.*). More importantly here, the Board adopted the *carriers*' position on the mandatory promotion issue and recommended that "all brakemen who are offered promotion to conductor should be required to accept such promotion." (*Id.*).

UTU refused to accept the recommendations of the Board. As a result, on April 17, 1991, UTU engaged in a nationwide legal strike. (Apx. 21a). The strike was short-lived as later that same day, Congress intervened and enacted what was essentially the Board's recommendations ending the strike. The bill containing these recommendations was passed by the House of Representatives and the Senate and signed into law the next morning by President Bush. (Apx. 21a). The bill is codified as Public Law No. 102-29.

Section 2 of that law specifically required the President to appoint a special presidential board ("Special Board") which would be empowered to conduct additional hearings for the purpose of clarifying, interpreting, and, if necessary, modifying the recommendations of PEB 219, now Public Law No. 102-29, if the Special Board determined that they were demonstrably inequitable or materially erroneous. (Apx. 21a).

Pursuant to this congressional mandate, President Bush appointed a three-member Special Board on July 18, 1991. The UTU appealed the Board's ruling on the mandatory promotion arguing that it was unfair and improper. The Special Board, however, rejected UTU's appeal on the grounds that the Board's ruling was fair and not materially erroneous. (*Id.*). As expected, the terms of the

new agreements incorporated the mandatory brakemen promotion requirement. (Apx. 22a). UTU, still outraged over PEB 219, filed suit challenging the constitutionality of Pub. L. No. 102-29. *United Transportation Union v. United States*, 987 F.2d 784 (D.C. Cir. 1993). UTU's challenge was unsuccessful.

For many older brakemen, however, promotion held, and holds, little allure. Under the seniority system long in place in the railroad industry, brakeman seniority does not carry over when one is promoted to conductor.[5] (Apx. 6a). Thus, a newly promoted conductor begins with no seniority, and takes his or her place at the bottom of the duty roster. (*Id.*).

The Plaintiffs herein acknowledge that Public Law No. 102-29, as implemented by the Special Board, required that they be promoted to conductor. They do not challenge that promotion. (Apx. 6a, 10a). Rather, they attack the manner in which the Defendants effected the elimination of the brakeman position . (*Id.*). Specifically, the Plaintiffs contend that the Defendants failed to take measures to mitigate the uniquely deleterious impact of promotion upon them (Apx. 7a). The Plaintiffs assert that the Defendants could have preserved the ability of older brakemen to control their work schedules either by dovetailing brakeman seniority with conductor seniority or by otherwise redistributing the workload to spare older brakemen the more arduous tasks. (*Id.*). The Plaintiffs claim that the failure of the Defendants to take these (or similar) steps gives rise to their claims. (Apx. 7a). Plaintiffs, however, admit that they were treated no differently under the seniority system than other newly promoted conductors. (Apx. 10a). In essence, the Plaintiffs argument reduces to the proposition that they should not be

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[5] Brakeman seniority is retained upon promotion to conductor, and in fact continues to accrue as one works as a conductor. The retained seniority is only relevant, however, when a brakeman chooses to bid for one of the very few remaining brakeman duty slots. Brakeman seniority cannot be used to bid for conductor positions. (Apx. 6a n.1).

subject to the routine operation of the seniority system; rather, it should be modified to accord them favorable treatment. (Apx. 10a).

SUMMARY OF ARGUMENT

The Plaintiffs fail to establish any compelling reason to review the appellate court's decision based on a *bona fide* seniority system. The decision is correct and well within the law and reason. There is absolutely no difference of opinion with regard to the statement and application of the law by the circuit court.

Plaintiffs, rather wish this Court to ignore the circuit opinion which correctly decides this whole matter and focus on pedestrian issues at the district court level. Despite this Court's direction and history of only accepting appellate cases of compelling magnitude, Plaintiffs wish this Court to act as a second court of appeals which it is clearly not disposed to do.

REASONS FOR DENYING THE WRIT

I. PETITIONERS/PLAINTIFFS FAIL TO ESTABLISH A BASIS FOR REVIEW OF THE APPELLATE COURT'S DECISION

A *writ of certiorari* is not a matter of right, but of judicial discretion. S.Ct. Rule 10. A *writ* is granted only for compelling reasons and generally not for asserted errors of findings or the misapplication of a properly stated rule of law. *Id., Fay v. Noia*, 372 U.S. 391, 336 (1963); Wright & Miller, 16 Fed. Prac. & Proc. § 4004 et seq (1988).

The Court considers such "compelling reasons" as those where there is a conflict between *circuit* courts on an important matter, or that a *circuit* court has decided an important question of federal law that has not been decided, but should be decided by this Court, or that a *circuit's* decision is in direct conflict with the decision of this Court. S.Ct. Rule 10(a), (c); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951).

Here, Plaintiffs point to no such basis for appeal or to even any compelling reason whatsoever for a *writ* to be granted. Indeed, Plaintiffs' complete argument concerning the decision of the Tenth Circuit comprises approximately one page. (Ptn. at 17-18). In the second of the two paragraphs, they assert the whole of their position that the Defendants "were obliged to negotiate a new and different seniority system" for them. Plaintiffs present no authority for such a statement which is clearly contrary to the requirements of the Act. 29 U.S.C. § 623(f)(2)(A); *Firefighters for Racial Equality v. Bach*, 731 F.2d 664, 668 (10th Cir. 1984). Furthermore, Plaintiffs, in this minimal argument, make no assertion that there is any serious question at issue or that there is a circuit conflict or a conflict with this Court's decisions. Nor do Plaintiffs take any exception with any finding of the Court of Appeals. Rather, Plaintiffs' sole assault on the Tenth Circuit's decision is that it is not ripe on the seniority system issue due to a lack of discovery. As earlier, however, Plaintiffs fail to support such an outlandish statement with any reasoning, let alone authority.

What Plaintiffs fail to grasp is that they are asking for something the law does not require. As the circuit court noted, the ADEA specifically provides that it is *not* unlawful "to observe the terms of a bona fide seniority system." (Apx. 8a-10a); also, 29 U.S.C. § 623(f)(2); *Dalton v. Mercer Co. Bd. of Educ.*, 887 F.2d 490, 492 (4th Cir. 1989). In seniority system cases, a plaintiff's only avenue of attack is disparate treatment, as a plaintiff must show that the seniority system was adopted with intent to discriminate. *Firefighters for Racial Equality v. Bach*, 731 F.2d 664, 668 (10th Cir. 1984) citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354-56 (1977); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 276-77 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 64-65 (1982); *Harvey v. United Transportation Union*, 878 F.2d 1235, 1242-43 (10th Cir. 1989). In *Teamsters*, this Court noted that where a seniority system in place, applied equally to

all employees, negotiated and implemented free from any illegal purpose it is a defense. *Teamsters* at 355-56. Such a seniority exception exists so that the existing vested rights of employees can be honored. *Firefighters* at 668.

Here, Plaintiffs admit that the seniority system is *bona fide*. (Apx. 9a) It had *long* been in place and uses as its basis length of service. What Plaintiffs want is for the petitioners to negotiate a completely new seniority system abandoning the system in place in the railroad industry from its inception. (Ptn. at 17) There is simply no basis in the law or common sense for any such requirements Plaintiffs' baseless demand for preferential treatment can not be a basis for a grant of a *writ*.

Here, the UTU merely abided by the seniority system which had been long in place, applied equally to all, and was the well-established method throughout the industry of obtaining seniority in a craft. Moreover, Plaintiffs do not challenge the seniority system but rather, want seniority in the system without working for it. It would indeed be quite disingenuous for Plaintiffs to now, after years in the system, a system which they worked to their benefit, assert the seniority system was enacted discriminatorily.[6]

The Tenth Circuit correctly decided this case on the *bona fide* seniority system basis. The circuit realized there was no need for any further findings or conclusions regarding other matters. (Apx. 8a, 11a). Even if the circuit could have somehow misapplied this properly stated rule, that, as noted above, does not provide a basis for a grant of a *writ*. See S.Ct. Rule 10(c); also *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

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[6] Any challenge to the seniority system at this late date would be time barred. See *Baraw v. New Orleans Steamship Ass'n*, 932 F.2d 473 (5th Cir. 1991); *Hamilton v. First Service Bank*, 928 F.2d 86 (4th Cir. 1990).

II. PLAINTIFFS FAIL TO ESTABLISH THAT THE COURT SHOULD REVIEW ANY RULING OF THE DISTRICT COURT

Plaintiffs attempt to overlook and ignore the well-founded decision of the appellate court and try to raise issues here decided by the district court.

Here, once again Plaintiffs miss the point. They attempt to treat a *writ* as simply another appeal arguing that this Court should review the granting of the summary judgment by the district court *de novo*. (Ptn. at 6) While that is the standard of review in the appellate court, this Court does not act as a second appellate court. See *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. at 502; *General Talk. Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175, 178-179 (1937); Wright & Miller, 17 *Fed. Prac. & Proc.* § 9039 (1988) (discussion of the creation of the circuit courts and elimination of direct review); and, Act of June 27, 1988, Pub. L. 100-352 § 1. Plaintiffs assert that the district court erred in converting the Defendants' motion to dismiss to a motion for summary judgment and holding that Plaintiffs failed to establish a pretext. Other than to regurgitate the arguments made before the district and appellate courts, Plaintiffs, as with the *bona fide* system argument, present no reason of any compelling stature that any issue raised should be reviewed.

Plaintiffs here do not even assert how the Supreme Court would have any jurisdiction of these issues here. Clearly, the Court is not interested in these mundane, pedestrian issues. See S.Ct. Rule 10. The Court's preference is for compelling issues decided by appellate courts.

Lastly, Plaintiffs assert that the district court erred in holding that the "disparate impact" doctrine is inapplicable under the ADEA. Initially, Plaintiffs assert that the appellate court affirmed this holding. (Ptn. at i). It is quite clear that the appellate court did not reach that issue. Indeed, the court noted:

> Recognizing that the question is as yet undecided in this Circuit, see *Faulkner v. Super Valu Stores, Inc.*,

> 3 F.3d 1419, 1428 (10th Cir. 1993), *we expressly decline to resolve it today.* We instead affirm on more limited grounds the grant of summary judgment against the allegations of disparate impact.

Apx. 8a (emphasis added). The Tenth Circuit expressly refused to address the issue here and it remains undecided in that circuit.

Plaintiffs do later admit that the appellate court did not reach this issue, but nevertheless, assert that the Court should review it. Plaintiffs, however, fail to establish any ground for such review.

This Court has a definite preference for issues which appellate courts or state courts of highest resort have passed on. S.Ct. Rule 10; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 558 (1981) (Court will not pass on issues not reached by appellate court); see also *Patrick v. Burget*, 486 U.S. 94, 94 n.5 (1988); 17 *Fed. Prac. & Proc.*, §§ 4004, 4036-40. On a rare occasion a *writ* may be granted while a case is pending before a circuit court and judgment has not been rendered. S.Ct. Rule 11; 28 U.S.C. § 2101(e). In order for such an extraordinary *writ* to be granted, a showing must be made that the case is of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S.Ct. Rule 11.

Rule 11 obviously does not apply here as the appellate court has already decided this case. Nor do Plaintiffs present any reason that this particular case is of imperative public importance which must be immediately decided. Again, their argument is a regurgitation of their arguments in the district and appellate courts.

Their apparent basis for a *writ* is that there is a confusion among the circuits. At this point, however, the Tenth Circuit is not confused as it has not decided the question. If this Court was, indeed, interested in resolving this question, this case, in its odd procedural stance with regard to this issue, would not be the case to grant a *writ*.

Here, the appellate court has refused to address the issue and the circuit remains undecided. Given the preference for appellate review, this case, presents only a district court's view. Moreover, given that the Plaintiffs are not really challenging their mandatory promotion or the *bona fideness* of the seniority system, but merely their placement according to the *bona fide* system, their claims do not present a compelling issue regarding disparate impact.

Given this, and the Plaintiff's inability to establish an ground for Supreme Court review of a district court opinion, as well as this Court's definite preference for appellate decisions, this is *not* the case to ignore standard practice and grant a *writ*.

CONCLUSION

For the foregoing reasons, Respondent United Transportation Union, respectfully requests that this Court deny Petitioners' request for a *writ of certiorari*.

Respectfully submitted,

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